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IN THE

Supreme Court of the United States

OCTOBER TERM, 1928.

No. 267.

ITHACA TRUST COMPANY, Sole Surviving Executor and Trustee Under the Last Will and Testament of EDWIN C. STEWART, Deceased, *Petitioner,*

vs.

THE UNITED STATES, *Respondent.*

CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

BRIEF FOR PETITIONER.

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SUBJECT INDEX.

	Page
Opinion Below	1
Grounds of Jurisdiction	1
History of the Case	2
Questions Presented	2-3
Statement	3
The Charitable Bequests	3
The Statute and Regulation	4
Decision of the Court of Claims	4
Summary of Argument	5
Argument:	
1. Under the Revenue Act of 1918 bequests to charities are allowable deductions when their actual value can be definitely ascertained within the period prescribed for the ascertainment of deductions, and the value of the net estate upon which the tax is computed	5
2. Under the Revenue Act of 1918 bequests to charities are allowable deductions when vested and subject to divesture upon a possibility too remote to be properly given the effect of depriving such bequests of any substantial value, and that value can be ascertained with reasonable certainty	10
Conclusion	15

TABLE OF CASES.

Boston Safe Deposit Co. v. Nichols, 18 F. (2d) 660	6
Central Union Tr. Co., *et al.*, v. U. S., 61 C. Cls. 828	8
Corpus Juris, Vol. 21, p. 980	6, 11
First National Bank of Birmingham v. Snead, 24 F. (2d) 186	6, 10
Herold v. Kahn, 159 Fed. Rep. 608	8
Herron, *et al.* Exrs. v. Heiner, 24 F (2d) 745	14
Hertz v. Woodman, 218 U. S. 205	7
Humes, *et al.* v. U. S., 276 U. S. ; 10 Ad. Op. 405	13, 14
McArthur v. Scott, 113 U. S. 340, 379	6, 11
Exrs. of Ruff v. Comm., 13 B. T. A. 85	12
Union Trust Co. v. Heiner, 19 F. (2d) 362	8

STATUTE.

Revenue Act of 1918	4
Regulation 37, Art. 77	4

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Opinion Below.

The opinion of the Court of Claims (R. 19) has not yet been officially reported.

Grounds of Jurisdiction.

The judgment to be reviewed was filed February 20, 1928. (R. 19) Motion for new trial was overruled May 28, 1928. The jurisdiction of this Court is based on 43 Stat. 939, Par. 3, C. 229 (Par. 288 Judicial Code U. S. C. A.).

History of the Case.

The suit is an action to recover Federal Estate Taxes illegally collected from the petitioner. (R. 9)

The petition was filed in the Court of Claims February 26, 1926. (R. 5)

A general traverse was filed on behalf of the United States on April 27, 1926. (R. 18)

The case was heard upon a stipulation of the facts. (R. 19)

On January 25, 1928, the case was argued and submitted on merits. (R. 18)

On February 20, 1928, the Court of Claims filed findings of fact and conclusions of law (R. 19) and ordered judgment dismissing the petition. (R. 25)

On April 18, 1928, petitioner filed a motion for a new trial which was overruled on May 28, 1928. (R. 26)

On July 13, 1928, a petition for writ of certiorari was filed (R. 26) and on October 15, 1928, the petition was granted.

Questions Presented.

1. Whether, under the Revenue Act of 1918, bequests to charities and similar institutions enumerated in the Statute are allowable deductions when their actual value can be definitely ascertained prior to the date prescribed by the Statute and the regulation for the ascertainment of deductions and the computation of the tax.

2. Whether, under the Revenue Act of 1918, bequests to charities are allowable deductions when preceded by a life estate with the added provision "I also authorize my wife (life tenant) to use any additional sum that may be necessary to suitably maintain her in as much

comfort as she now enjoys," where the income from such portion of the estate is in excess of that necessary, in the absence of unusual circumstances, to maintain the life tenant suitably in as much comfort as she enjoyed at any time during the lifetime of the said testator.

Statement.

The decedent, Edwin C. Stewart, died testate on June 15, 1921, a resident of Ithaca in the State of New York. (R. 19)

By his will he made certain bequests in remainder to trustees in trust exclusively for charitable and like purposes enumerated in the Act of 1918. (R. 15-17)

The widow, the life tenant, died December 12, 1921, *less than six months after the death of testator.* (R. 19) The total amount actually paid or accrued to the widow as such life tenant was $10,110.04. (R. 21)

Estate tax return was filed in which deduction was taken for the full amount paid to said charities. On review and audit the Commissioner assessed the additional tax herein sued for. (R. 20)

Application for refund was duly filed but was denied and no refund has been made. (R. 21)

The Charitable Bequests.

Briefly, the testator gave his entire residuary estate to his widow for life with the authorization "to use any additional sum from the principal * * * that may be necessary to suitably maintain her in as much comfort as she now enjoys." Upon the death of the wife the entire residuum was given to trustees exclusively for charitable and like purposes. (R. 15-17) (Finding XV, R. 21)

The Statute and Regulation.

"Section 403: That for the purpose of the tax the value of the net estate shall be determined (a) In the case of a resident by deducting from value of the gross estate—

(1) Such amounts for funeral expenses, administration expenses * * * and such amounts reasonably required and actually expended for the support *during the settlement of the estate* of those dependent upon decedent.

(2) (Property identified as previously taxed within five years).

(3) The amount of all bequests, legacies, devises, or gifts * * * or to a trustee or trustees for such religious, charitable, etc., * * * purposes. This *deduction* shall be made in the case of all decedents who have died since December 31, 1917:

* * * * * * * * *

"Section 404. * * * The Executor shall also *at such time* and *in such manner as may be prescribed by regulations made pursuant to law*, file * * * a return * * * setting forth (a) the value of the *gross* estate of the decedent *at the time of his death* * * *; (b) the deductions allowed in Section 403: (c) *the value of the net estate of the decedent, as defined in Section 403;* and (d) the tax paid or payable thereon * * *."

Article 77 of Regulations 37 provides:

"* * * A return on Form 706 is required * * *. It must be filed within one year after the date of death, unless an extension is had, * * *." (Italics ours).

Decision of Court of Claims.

In its decision the Court of Claims ignored the fact that the actual value of the bequests to charities was definitely ascertained when the tax was computed, giving as its reason for dismissing the petition:

"* * * a contingency permeates the gifts to charity which may prevent any of them from ever going into possession and enjoyment * * *."

Summary of Argument.

1. Under the revenue act of 1918 bequests to charities are allowable deductions when their actual value can be definitely ascertained within the period prescribed for the ascertainment of deductions, and the value of the net estate upon which the tax is computed.

2. Under the revenue act of 1918 bequests to charities are allowable deductions when vested and subject to divesture upon a possibility too remote to be properly given the effect of depriving such bequests of any substantial value, and that value can be ascertained with reasonable certainty.

I.

Under the revenue act of 1918, bequests to charities are allowable deductions when their actual value can be definitely ascertained within the period prescribed for the ascertainment of deductions, and the value of the net estate upon which the tax is computed.

The Revenue Act of 1918 allowed charitable and similar bequests as *deductions*. It set forth in detail the deductions allowable, many of which could be ascertained after the period of administration only. It refers to the value of the *gross* estate *at date of death*, but refers to the *net* estate as defined in Section 403. The *net* estate is the *gross* estate at date of death, less the deductions allowed in Section 403, of which charitable and similar bequests is one. The *net* estate cannot be determined from facts known at date of death, but

is dependent upon facts which subsequently develop. The time set for the ascertainment of the *net* estate is within one year from date of death.

At testator's death the charitable bequests in the instant case were vested.

> First National Bank of Birmingham v. Snead, 24 F. (2d) 186.
> McArthur v. Scott, 113 U. S. 340, 379.
> 21 Corpus Juris 980.

They had a substantial value at date of death; and their actual value, because of the death of the life tenant within six months from decedent's death, was definitely ascertained, during the period of administration, while the legal title to the residuum was in the petitioner, and prior to the date prescribed for the ascertainment of deductions and the computation of the tax.

We submit that the only theory upon which the deduction of a charitable bequest should be disallowed is, that the *amount* (or value) of such bequest is not ascertainable within the period prescribed for the ascertainment of deductions from the *gross* estate in order determine the *net* estate—the measure of the tax.

The courts uniformly hold that the value of the net estate is to be determined by facts known at the time of the computation rather than by facts known at the time of decedent's death.

In the case of Boston Safe Deposit Co. v. Nichols, 18 F. (2d) 660, (Revenue Act of 1918), the Court said:

> "* * * It is the plaintiff's contention that inasmuch as the equitable life interest terminated before it was required to pay the tax, it had a right to deduct the actual value of the future interest *determined by facts known at the time of the com-*

putation rather than by facts known at the time of decedent's death.

"* * * It is undoubtedly true the liability for the tax is fixed at the time of the decedent's death.

"Hertz v. Woodman, 218 U. S. 205. *It is not, however, true that the amount of the net estate, which is the measure of the tax, can be ascertained from facts known at the time of the death.* The amount of other deductions, such as expenses, losses incurred during the settlement of the estate, amount required for support of dependents, *all depend upon facts subsequently developed,* and the law concedes to the taxpayer the right to deduct the amount of expenses actually incurred, of losses actually suffered, and the amount actually allowed dependents under the laws of the state. The law does not permit the taxing authorities to estimate or approximate, or to indulge in speculation as to the probable amounts of such deductions. I do not mean to imply that the government may not resort to mortuary or experience tables for approximate results *when it is impossible to obtain definite and actual values.* The taxpayer is entitled to deduct from the gross estate the amount of the bequest to the charitable organization and those administering the law are wholly without authority to add to the taxpayers burden by invoking rules and regulations adopted by the administrative department. This is precisely what the defendant has done in the present case. Although the exact amount of the charitable bequest was susceptible of certain and definite ascertainment, the defendant has refused to adopt the actual value and has insisted upon a result based upon probabilities. The result of defendants refusal is to deny the plaintiff a deduction to which it is clearly entitled under the statute. The statute makes no provision for the use of mortuary tables, and they cannot be read into the statute as absolute rules which the law will require to be ap-

> plied to determine the duration of a life interest, or remainder interest, when the actual value can be ascertained. Vicksburg & Meridian R. R. Co. v. Putnam, 118 U. S. 545; Kahn v. Herold, 147 Fed. 575: 'Their use is only justified when no better evidence is obtainable' Herold v. Kahn, 159 Fed. 608." (Italics ours).

In Herold v. Kahn, 159 Fed. Rep. 608, the tax was assessed and collected under the Revenue Act of 1898 upon the life estate of a legatee who had died approximately two years after the death of the testator, but while the property was still in the hands of the executor. (The Act of 1898 taxed the right to receive as distinguished from the right to transmit). At the time the tax was computed neither the executor nor the Commissioner knew of the death of the life tenant. It was held that the facts known at the date of computation (actual value of the life estate) should be used, and the taxpayer was given judgment.

In Union Trust Co. v. Heiner, 19 F. (2d) 362, (Revenue Act of 1918), the widow, the life tenant, died within twelve hours after the death of the husband. The Court said:

> ". . . . The taxing act in question manifestly assumes that the *net estate will be ascertained before the tax is computed*, and in the instant case where the life estate of the widow ended *prior to the determination of the amount of the tax*, only the actual and not the theoretical value of that life estate should enter into the computation . . . ." (Italics ours)

In the case of the Central Union Trust Co. et al. v. U. S., 61 Ct. Cls. 828, 840, (Revenue Act of 1918), testator, a resident of the State of New York, bequeathed

the residue of his estate in trust for certain charitable purposes, directing his executors and trustees to cause a corporation to be formed with authority to administer the trust.

However, the income from such residuum, between the date of death and the date of the organization of the corporation, was to be paid to testator's nephew.

The Court said:

> "* * * We think that what the commissioner should have done was to take either the actual income paid to the nephew and add it to the net estate or to have found a present value of this income as of the date of death, increasing the net estate by this amount.
>
> "The contemplated foundation was formed within a year from the testator's death. The tax upon the value of the net estate was 'due one year after decedent's death'. The State statute allowed the executors a year within which to pay legacies. *When the year ended* the executors were in a position to make their return *so as to include the deductible items allowed by section 403 to arrive at the net estate*, which alone was taxable. It is proper, therefore, to limit the nephew's interest by reason of the income to be paid *to him to the one year within which all the facts became known*, and the right to possession of the corpus of the residuary estate became absolute. * * *" (Italics ours.)

The *value* of the bequests in the instant case was not ascertainable upon facts known at the time of the decedent's death. The bequests were of the testator's residuum, the value of which depended upon the amount of *other deductions* allowed by the statute which could not be ascertained except upon facts which developed during the period of administration.

We submit, that the fact that this *value* was not ascertainable until subsequent to date of decedent's death, does not prevent the allowance of the deduction, as its *actual* value was definitely ascertained within the year. Otherwise, if a decedent left his entire estate to charity, no deduction therefor would be allowed.

But the statute and regulations prescribe the period within which to ascertain deductions, and the death of the widow in the instant case within the period, made the *value* of the bequests definite, and such value was therefore deductible.

II.

Under the revenue act of 1918 bequests to charities are allowable deductions when vested and subject to divesture upon a possibility too remote to be properly given the effect of depriving such bequests of any substantial value, and that value can be oscertained with reasonable certainty.

This question was recently decided in favor of the taxpayer by the Circuit Court of Appeals for the Fifth Circuit in the case of the First National Bank of Birmingham v. Snead, 24 F (2d) 186. In that case the will contained the following provision:

> "If at any time, in the opinion of said Trustees, the net income from said trust estate shall not be sufficient for the proper support and comfort of my said wife, the Trustee shall pay over to my said wife such additional sum or sums out of the principal of said trust estate as to them may seem necessary or desirable for such purpose * * *."

The remainders were to charities, and the widow was living at the date of the computation of the tax, while in the instant case the widow died within the year of administration. The court said:

> "The mentioned charitable institutions having been in existence when the will took effect and having been capable of taking the bequests in their favor upon the death of testators widow, * * * the estates or interests devised to those institutions were vested. McArthur v. Scott, 113 U. S. 340, 379; 21 Corpus Juris 980, * * *."
>
> "Under the above set out provision of the statute the existence of those bequests required some deduction * * * unless the power * * * to invade the corpus * * * had such scope or effect as to keep the bequests * * * from having any substantial ascertainable value *when the value of the testator's net estate was to be determined.* * * * The authority of the trustees to make payments to the widow out of the corpus * * * was dependent upon their forming the opinion that the net income from the trust estate was not sufficient for the proper comfort and support of the widow. The trustees are obliged to act in good faith * * *. They are not empowered arbitrarily to invade the corpus * * *; and the exercise of the discretion is subject to judicial revision and control. * * *
>
> "From the allegations of the complaint it is barely possible, but wholly improbable, that at any time any sum in addition to the net income * * * will * * * be necessary * * * to be paid to her * * *. Those allegations indicate that the possibility of the exercise in good faith of the power conferred on the trustee resulting in the exhaustion of the trust estate is so remote that a finding that, by reason of the existence of that power, the vested interests of the charitable institutions had

> no substantial value when the will took effect, would be arbitrary and unwarranted. * * * For estate tax purposes the approximate amount of that value was ascertainable * * *." (Italics ours)

Reference is made to Finding XIII (R. 21) in the instant case, wherein the Court of Claims found that the widow (life tenant) and decedent had for many years prior to his death lived in a simple and unpretentious style, spending together less than the income produced by the estate; that the income from the estate after the payment of debts and legacies (one of which was $50,000 to the widow) was in excess of the sum necessary in the absence of unusual circumstances to suitably maintain the widow in as much comfort as she enjoyed at any time during the lifetime of the testator.

We submit that upon the theory of the above case, which is directly in conflict with the decision of the Court of Claims in the instant case, the petitioner is also entitled to recover.

This question was recently considered by the United States Board of Tax Appeals in the case of the Mercantile Trust Co., Executor of Frank A. Ruf, v. Commissioner of Internal Revenue, 13 B. T. A. 85. In that case the bequest to the widow was as follows:

> "I direct my Trustee * * * to pay over unto my wife * * * all of the net income and revenue derived from said Trust estate, or, if need be, such part of the corpus as may be necessary for the comfort, maintenance and support of my wife during her life. A request in writing, to my Trustee, made by my wife, stating that the sum requested by her is needed for her comfort, maintenance and support, shall be authority to my Trustee to pay

> unto her any sum so requested, out of the corpus; or, in the event of her incapacity, then my Trustee may, in its discretion, use so much of the corpus as may be necessary for her comfort, maintenance and support. * * *"

The remainder was bequeathed to charities, and the Board, after a reference to the case of the First National Bank of Birmingham v. Snead, *supra*, used the following language:

> " * * * We think that the averments of the complaint show such a state of facts that the existence of the power conferred on the trustees to invade the corpus of the trust estate cannot properly be given the effect of depriving the bequests to charitable institutions of any substantial value. For estate tax purposes the approximate amount of that value was ascertainable, and was allowable as a deduction from the testator's gross estate. * * * "
>
> " * * * Although the power to demand further sums of money in addition to the amounts specifically provided for her * * * was expressly placed in the widow, her power is limited to those sums necessary for 'her comfort, maintenance and support', and they must be reasonable under all circumstances. * * * "

The Board then makes reference to the other cases cited *supra*, and concludes this question with a reference to the case of Mitchell et al., Executor of Gates, v. U. S., 63 Court of Claims 613; affirmed by this Court under the title of Humes et al. v. U. S., 267 U. S. 487. The Board said:

> " * * * The facts in that case, however, are clearly distinguishable from those of the instant proceeding. * * * "

The instant case differs from the Humes case, *supra*, First, because in that case the legacies to charities did not vest but depended upon the death of testator's niece before she reached the age of forty years, without issue then living; Second, because there was no reasonable method to ascertain the value of charitable bequests at the date of the computation of the tax, while in the instant case the *actual* value of such bequests was ascertained within the year prescribed by the statute and regulation.

A recent case distinguishing between such legacies when vested is the case of Herron et al., Executors, v. Heiner, 24 F (2d) 745, wherein the court said:

> "The cases cited by the defendant to support the claim that nothing vests in enjoyment in charities, until the death of the incompetent, do not sustain the decision. In those cases, the charitable use was to arrive at some future time, upon the happening of some contingency. Here, not only have the charitable interest vested, but a total of $342,443.38 from the income of the trust fund has already been actually paid to the various charitable institutions, or permanently set aside for future payment, in accordance with the provisions of the will."
>
> • • • • • • •
>
> "In conclusion: The clear purpose of the testator, in the humane and philanthropic distribution of his large estate must not be defeated and the manifest purpose of Congress exempting charitable gifts from taxation must not be thwarted by any narrow and meaningless interpretation of testator's will."

Conclusion.

The judgment of the Court of Claims should be reversed and such judgment directed as to this Honorable Court seems proper.

Respectfully submitted,

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